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Nos. 07-589 and 07-597

In The Supreme Court of the United States

PSEG FOSSIL LLC, et al.,

Petitioners,

v.

RIVERKEEPER, INC., et al.,

Respondents.

UTILITY WATER ACT GROUP,

Petitioner,

v.

RIVERKEEPER, INC., et al.,

Respondents.

On Petitions For A Writ Of *Certiorari* To The United States Court Of Appeals For The Second Circuit

BRIEF OF COOLING WATER INTAKE STRUCTURE COALITION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amicus curiae Cooling Water Intake Structure Coalition is an informal, *ad hoc* organization that represents the interests of business and industry in the reasonable implementation of requirements for cooling water intake structures under Clean Water Act section 316(b), 33 U.S.C. § 1326(b). The organizations comprising the Cooling Water Intake Structure Coalition for purposes of these petitions for writ of *certiorari* are: the American Chemistry Council, the American Forest & Paper Association, the American Petroleum Institute, and the National Association of Manufacturers.[1] *Amicus curiae* Chamber of Commerce of the United States of America is a national institution representing the unified interests of U.S. businesses. The Chamber's membership includes more than three million businesses. The Chamber believes that economic growth and environmental progress are not incompatible pursuits, and that responsible business and environmental leaders can work together to ensure a healthy environment and economic growth.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

These organizations represent a broad spectrum of U.S. business and industry. They have among their members businesses that withdraw water from rivers, lakes, estuaries, and the territorial seas for use in their facilities for cooling purposes. These members may be affected directly by the Second Circuit's incorrect interpretation in the decision below of the requirements of Clean Water Act section 316(b). *Amici* also represent businesses that are large consumers of electric power, which can expect substantially increased operating costs from the less-flexible requirements under section 316(b) for electric utilities mandated by the decision below. Also, to the extent that the Second Circuit's view of the permissible consideration of costs and benefits in setting effluent limitations under the Clean Water Act is followed by EPA or individual permit writers in imposing effluent limitations on point-source discharges, *amici*'s members will suffer additional adverse effects as a result of the decision below.

For the most part, *amici*'s members do not operate facilities subject to the Environmental Protection Agency's ("EPA's") regulation establishing requirements for cooling water intake structures at Phase II existing facilities, 69 Fed. Reg. 41,575 (July 9, 2004) (hereinafter the "Phase II Rule"), which is the subject of the decision below. That is because the Phase II Rule regulates only existing facilities whose primary activity is the generation and transmission or sale of electricity. *See* 40 C.F.R. §§ 125.90, 125.91(a), Utility Water Act Group Petition Appendix ("UWAG App.")

125a, 126a. But existing industrial and commercial facilities (as well as smaller electricity generation plants) that have cooling water intake structures, which EPA has designated "Phase III facilities," are also subject to requirements implementing Clean Water Act ("CWA") section 316(b), established by permit writers on a case-by-case basis. 40 C.F.R. § 125.90(b), UWAG App. 125a; 71 Fed. Reg. 35,006, 35,008 (June 16, 2006). Thus, *amici*'s members will be adversely affected if those permit writers follow the Second Circuit's restrictive view of the permissible consideration of costs and benefits and the use of "restoration measures" in establishing requirements under section 316(b). (For that reason, Cooling Water Intake Structure Coalition member American Petroleum Institute filed an *amicus curiae* brief in the case below, in support of EPA's authority to allow restoration measures as an alternative or supplement to cooling water intake structure design and operation specifications.)

SUMMARY OF ARGUMENT

The petitions for a writ of *certiorari* filed by PSEG Fossil LLC, *et al.* and Utility Water Act Group provide a thorough explanation of the Second Circuit's erroneous determinations, in conflict with decisions of other courts of appeals, about the requirements for cooling water intake structures under Clean Water Act section 316(b). The petitions also explain how the Second Circuit's restrictive view of

EPA's discretion in determining requirements for cooling water intake structures will impose huge costs on numerous electric generating plants and will affect the nation's access to reliable, reasonably priced electricity, making this case one of national significance that merits this Court's attention.

The pernicious effects of the Second Circuit's interpretation of section 316(b) will be felt much more widely, however, because it will inevitably be considered, and perhaps followed, in applying section 316(b) to a large universe of industrial and commercial facilities that withdraw water for cooling purposes. Moreover, because the wide diversity among those industrial and commercial facilities makes flexibility in applying section 316(b) even more important to avoid imposing excessively costly requirements for little benefit, the extreme, rigid view of section 316(b) in the Second Circuit's decision has the potential to have a proportionately more severe effect on those facilities than on the electric utilities represented by petitioners.

Additionally, since the Second Circuit based its restrictive view of EPA's discretion in establishing requirements for cooling water intake structures under CWA section 316(b) on its interpretation of CWA section 301 requirements for limitations on wastewater discharges, the adverse effects of the decision below may be felt much more broadly than by just those facilities that operate cooling water intake structures. The Second Circuit's view that EPA cannot reject a wastewater treatment technology

option that has far greater costs but only minimal additional pollution reduction benefits would, if applied to the thousands of facilities with wastewater discharges, impose serious, unproductive financial burdens on society that make this case an important one for the Court's review.

ARGUMENT

I. The Second Circuit's Decision May Impose Costly Requirements on Cooling Water Intake Structures at Many More Facilities than Just Electric Utilities.

The Phase II Rule that is the subject of the decision below affects hundreds of electric utility generating plants and, if EPA is forced by the decision below to impose requirements based on the most effective technology for cooling water intake structures that the utility sector can reasonably bear, will impose billions of dollars of compliance costs on the utility sector. *See* Utility Water Act Group petition for writ of *certiorari* ("UWAG Pet.") at 36-37. Much of those costs can be expected to be passed on to purchasers of electricity, such as those represented by the *amici*. The scope of the number of facilities affected by the Second Circuit's decision and the costs that the decision directs EPA to impose make the decision one of national importance that merits review by this Court.

The impact of the Second Circuit's decision may be even wider, however, because of its potential effect on the implementation of CWA section 316(b) at the Phase III industrial and commercial facilities and small utilities. Under 40 C.F.R. § 125.90(b), UWAG App. 125a-12a, Phase III facilities and other facilities for which EPA has not promulgated nationwide categorical standards "must meet requirements under section 316(b) of the CWA determined by the [state or EPA permit writer] on a case-by-case, best professional judgment (BPJ) basis." (While other portions of the Phase II Rule have been suspended by EPA, that section remains in effect. 72 Fed. Reg. 37,107, 37,108 (July 9, 2007).)

In the decision below, the Second Circuit has interpreted CWA section 316(b) as dictating that, at least when developing national standards for a category of sources, EPA choose the most effective technologies for minimizing the impact of cooling water intake structures that the category as a whole "can reasonably bear." *Riverkeeper, Inc. v. U.S. Environmental Protection Agency,* 475 F.3d 83, 99-100 (2d Cir. 2007), UWAG App. 28a-30a. EPA may not consider the costs and benefits of that technology, even if the costs are wholly disproportionate to the benefits, but may only consider relative costs when two technologies "produce essentially the same benefits." *Id.* at 100-101, UWAG App. 30a-31a. In fact, the decision suggests that, faced with a technology that costs 50 percent more but assures that one additional fish will be saved from impingement on or entrainment in the

cooling water intake structure, EPA is bound to impose requirements based on the more costly technology. *Id.* at 100, UWAG App. 31a.

As petitioners have demonstrated, the decision below conflicts with decisions of other courts, including the First Circuit and the Second Circuit itself, as well as long-standing EPA practice, about the extent to which EPA can consider costs and benefits in determining the "best technology available for minimizing adverse environmental impact" under section 316(b). *See* UWAG Pet. at 19-23; PSEG Pet. at 17-25; *Riverkeeper Inc. v. U.S. Environmental Protection Agency*, 358 F.3d 174, 194 n.22 (2d Cir. 2004) ("*Riverkeeper I*") ("We think it is logical for the EPA to compare the improvements that both dry cooling and closed-cycle cooling offer over oncethrough cooling. . . . [I]t is undeniably relevant that [dry cooling] represents a relatively small improvement over closed-cycle cooling at a very significant cost.").

Although the decision below was in the context of national, categorical requirements for Phase II facilities and does not apply directly to case-by-case permit requirements for intake structures at the remaining universe of existing facilities (Phase III facilities), permit writers now must decide, in considering whether to impose additional requirements for cooling water intake structures at individual Phase III facilities, whether to adopt the flexible interpretation of section 316(b)'s requirements followed by EPA and other courts, or the extreme view of the limits of EPA's discretion under CWA section 316(b) provided by the Second Circuit in the decision below.

If the permit writers choose to follow the Second Circuit's view that "best technology available for minimizing environmental impact" means the technology that produces the least impingement and entrainment of aquatic organisms, no matter how high the cost in comparison to the incremental reduction of impingement and entrainment, then the many Phase III facilities represented by *amici* and others will be adversely affected, and society will suffer large costs with little incremental benefit.

Although Phase III facilities collectively only withdraw about 10 percent as much the cooling water as the large electric utility plants covered by Phase II, 71 Fed. Reg. at 35,017, there are thousands of industrial, commercial, and institutional facilities that use cooling water. *See* 69 Fed. Reg. 68,444, 68,455 n.4 (Nov. 24, 2004) (almost 700 Phase III facilities have intake structures withdrawing 2 million gallons or more per day). If only large Phase III facilities (those withdrawing over 50 million gallons a day for cooling, of which there are about 150) were subject to regulations imposing stringent requirements for cooling water intake structures similar to those the Phase II Rule imposed on large electric utilities, EPA estimates that compliance costs would be on the order of $40 million per year. 71 Fed. Reg. at 35,031-32. Because of the nature of Phase III facilities, EPA estimates that such expenditures would produce only about one-fourth of the benefit per dollar spent as the Phase II Rule. *Id.* at 35,018. If, as the Second Circuit

concluded, section 316(b) requires even more stringent provisions than those imposed by the Phase II Rule on electric utilities, then applying that same approach to the remainder of existing facilities (Phase III facilities) would impose even greater costs with even lower cost-effectiveness.

The Second Circuit decision at issue here will, at a minimum, create uncertainty and confusion about what factors may be considered by permit writers in the application of section 316(b) on a case-by-case basis to the many facilities with cooling water intake structures outside of the electric utility sector. Additionally, if permit writers choose or are required to use the Second Circuit's very restrictive view of section 316(b), the Second Circuit's decision will impose a large financial burden on society for measures at these additional facilities that are not cost-effective and have costs wholly disproportionate to their benefits. These additional adverse effects of the Second Circuit's decision provide further justification for granting the petitions.

(A group of environmental advocacy groups with essentially the same members as respondents in the instant case are currently pursuing litigation seeking to overturn EPA's decision to continue to regulate Phase III facilities on a case-by-case basis. *ConocoPhillips, et al. v. EPA*, Fifth Cir. No. 06-60662; *Riverkeeper, et al. v. EPA*, S.D. N.Y. No. 1:06-cv-12987-PKC; *see also* UWAG Pet. at 7 n.2. If that litigation were successful, then the impact of the Second Circuit's decision – which requires that categorical section

316(b) requirements be based on "the optimally best-performing" facilities in the country, 475 F.3d at 100, UWAG App. at 30a, rather than on technologies that can be applied to an individual facility – could be even greater.)[2]

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[2] *Amici* do not agree with petitioners that the pending Fifth Circuit case presents "precisely the same issue" as addressed in the Second Circuit decision for which they seek *certiorari*, *see* UWAG Pet. at 29, although the petitioners in that case (which are basically the same as the respondents in this case) have argued that the Second Circuit decision is incompatible with EPA's interpretation of section 316(b) as applied to Phase III facilities. In the rulemaking at issue in the Fifth Circuit (and S.D. N.Y.) case, EPA decided that it was best to continue to regulate Phase III existing facilities on a case-by-case, best professional judgment basis, based on its assessment that imposing a uniform categorical set of requirements for all such facilities, given the highly diverse nature of such facilities and their setting, would impose costs on the sector wholly disproportionate to the benefits. 71 Fed. Reg. at 35,017-18. The Phase III rulemaking being challenged in the Fifth Circuit did not address the manner in which permit writers, imposing section 316(b) requirements on Phase III existing facility intake structures on a case-by-case basis, could consider the relationship of the cost of compliance options to the reduction in environmental impact they would produce. *See id.* That issue may arise, however, when permit writers develop case-by-case requirements to implement section 316(b) for individual Phase III facilities. Unless this Court reviews the Second Circuit decision, the Second Circuit's restrictive view of the factors that may be considered in establishing requirements under CWA section 316(b) thus could adversely affect Phase III facilities regardless of the outcome of the Fifth Circuit case.

II. The Second Circuit's Rejection of Restoration Measures for Implementing Section 316(b) Would Be Particularly Problematic if Applied to Industrial and Commercial Facilities.

EPA's Phase II Rule allowed the permitting agency, when determining whether an electric utility plant is utilizing the best technology for minimizing adverse environmental impact, to take into account measures the facility has implemented or will implement to enhance the number, type, or condition of fish in the body of water from which the facility withdraws its cooling water. These "restoration measures" could be used as an alternative to or in addition to implementation of technologies related to the cooling water intake structure itself, as a means to avoid or minimize adverse environmental impact resulting from aquatic life impinging on or being entrained in the intake structure. *See, e.g.*, 40 C.F.R. § 125.94(c), UWAG App. 134a-135a; 40 C.F.R. § 125.95(b)(5)(iv); 69 Fed. Reg. at 41,598, 41,609, 41,627-28. The Second Circuit vacated the provisions of the Phase II Rule allowing consideration of restoration measures, 475 F.3d at 108-110, UWAG App. 49a-54a finding that such measures "are 'plainly inconsistent' with the statute's text." *Id.* at 109, UWAG App. 52a (quoting *Riverkeeper I*, 358 F.3d at 189).

EPA included restoration measures as one of the options for meeting standards for cooling water intake structures for large electric utilities in the Phase II Rule because it would provide greater flexibility in how facilities could achieve compliance with

the Phase II Rule and because it could in many cases better minimize adverse environmental impact from cooling water use than could technologies applied to the intake structures themselves. *See*, *e.g.*, 69 Fed. Reg. at 41,598, 41,609, 41,628. EPA recognized that existing facilities often have more limited technology options than new facilities, and the cost to "retrofit" certain technologies may be far higher for an existing facility. *See*, *e.g.*, 69 Fed. Reg. at 41,628. Obviously, certain "technologies" for minimizing the impact of a cooling water intake structure on aquatic life, such as the location of the intake, may be dictated by the existing facility and structures. Because of the wide range of circumstances of existing facilities, the availability and cost of implementing a given technology can vary widely. *Id.* Congress has recognized some of these distinctions, as well, directing EPA to set different, more delimited, requirements for new sources than for existing sources. *See* 69 Fed. Reg. at 68,476-77.

The considerations that led EPA to conclude that the restoration measures option will provide a necessary measure of flexibility for addressing cooling water usage at existing large utilities are even more compelling with respect to application of CWA section 316(b) to existing industrial facilities. EPA acknowledged some of the problems facing existing industrial facilities in the preamble to the proposed Phase III rule:

> Costs to retrofit an existing facility to install a "hard" technology can be much higher than

> costs to install one at the time a facility is constructed, and those costs can vary considerably from site to site. Thus, the range of technologies that are "available" to existing facilities to meet the performance standards is narrower than the range of technologies available to new facilities.

69 Fed. Reg. at 68,476. For that very reason, restoration measures have been used in the past in case-by-case section 316(b) requirements for some existing facilities, to address "the more limited availability of other technologies for existing facilities." *Id.*

Existing industrial facilities present a wider range of locational and process constraints for application of uniform technology requirements than do existing utility generating stations. Industrial facilities are more likely to be located in close proximity to other properties, and it is not unusual for them to have been operated and expanded over half a century or more. Installation of certain technologies to reduce impingement and entrainment mortality may be physically impossible due to site constraints. In addition, the generally smaller scale of cooling water usage at industrial facilities (*cf.* 67 Fed. Reg. 17,121, 17,130, 17,135 (April 9, 2002) *with* 69 Fed. Reg. at 68,455-56 and 68,502) can make some technologies impracticably costly and cost-ineffective.

The petroleum industry presents a particularly dramatic example of this: EPA expects that some existing offshore oil and gas extraction platforms and mobile drilling units will be subject to cooling water

intake structure requirements under the Phase III rule. *See, e.g.,* 70 Fed. Reg. at 71,059. Such facilities clearly present different problems and different opportunities for minimizing adverse environmental impact as compared to an electric utility that has been and will be withdrawing similar volumes of cooling water from an adjacent river for decades.

Without the option of demonstrating that they are operating the best technology available for minimizing adverse environmental impact through restoration measures, some industrial facilities would find it difficult if not impossible to comply with section 316(b) requirements, in light of the wide range of circumstances that industrial facilities will have to address in their compliance efforts. EPA wisely exercised its discretion in interpreting the sparse language of section 316(b) to allow existing electric utility plants the option of minimizing the adverse internal impact of their cooling water usage through the flexibility of the restoration measures option, an interpretation which provides substantial benefit to industrial facilities as well.

The Clean Water Act provides no explanation of what it means for the "location, design, construction, and capacity of" a cooling water intake structure to "reflect" the "best technology available" for "minimizing adverse environmental impact." The legislative history of section 316(b), a provision which was thrown into the statute as an afterthought, does not elucidate the meaning of those terms. *See Riverkeeper I*, 358 F.3d at 187. Since Congress has not spoken

directly on the issue, EPA's interpretation of section 316(b) as allowing "restoration measures" as one way in which an existing facility can demonstrate that its cooling water intake structure satisfies the criteria of section 316(b) should have been upheld by the Second Circuit because EPA's interpretation is a "permissible" one. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Courts considering other technology requirements in the Clean Water Act have found that they allow agency discretion to consider ambient conditions as part of the assessment of the best technology. *See* UWAG Pet. at 34-36.

The significant financial burden, with little or no incremental benefit, that will be imposed on industrial facilities if they do not have the option of demonstrating compliance with CWA section 316(b) through use of restoration measures is an important national interest that justifies granting the petitions to correct the Second Circuit's error and resolve inconsistencies with Clean Water Act interpretations by other circuits.

III. The Second Circuit's Restrictive Interpretation of CWA Section 301, If Not Corrected by the Court, May Have Significant Adverse Effects Beyond Regulation of Cooling Water Intake Structures.

Because CWA section 316(b) mandates requirements for cooling water intake structures that shall

be required in any "standard established pursuant to section 301," the Second Circuit turned to section 301 for "guidance" as to the factors Congress intended EPA to consider in developing requirements for cooling water intake structures under section 316(b). 475 F.3d at 97. The decision below therefore provides the Second Circuit's interpretation of how costs and benefits may be considered in the establishment of requirements for wastewater discharges under section 301 (through "effluent limitations guidelines"). In so doing, the Second Circuit rejected EPA's interpretation of the statute, and that of other Circuits as well, to find that EPA has only very limited discretion to consider how the costs of wastewater treatment technology relate to incremental reductions in pollutant discharges. *See* UWAG Pet. at 26-28; PSEG Pet. at 19-21.

In the Second Circuit's view, EPA cannot consider the fact that one of the wastewater treatment technology options is vastly less cost-effective than others, or that the cost of one the options is wholly disproportionate to the benefits it would produce. The only way EPA may reject a more-costly wastewater treatment technology is where EPA finds that a lower-cost technology produces "essentially the same benefits" but has "markedly different costs." 475 F.3d at 100-101, UWAG App. 32a.

Because the Second Circuit offered this interpretation of CWA section 301 in the context of determining what factors EPA may consider in assessing best technology available for minimizing adverse environmental impact under CWA section 316(b), rather

than in reviewing effluent limitations imposed by EPA or state authorities under CWA section 301, the decision below arguably is not binding on EPA or state authorities issuing such effluent limitations. Nevertheless, respondents and other advocacy groups likely will claim that the decision below is binding precedent on the extent to which costs and benefits may be taken into account when establishing effluent limitations, and EPA also may choose to follow the unequivocal language of the Second Circuit's interpretation of section 301.

EPA has already applied section 301 in issuing effluent limitations guidelines under CWA section 304(b), 33 U.S.C. § 1314(b), for dozens of categories of discharges covering a large swath of industrial and commercial activities. *See* 40 C.F.R. pts. 405-471. The Second Circuit's incorrect view of section 301 may nevertheless have substantial adverse effects on businesses, in a number of ways. EPA is required to consider, "at least annually," whether it is appropriate to revise its effluent limitations guidelines regulations. CWA section 304(b), (m)(1)(A). Additionally, EPA must identify and develop effluent limitations guidelines for additional categories of sources which the EPA Administrator determines have non-trivial discharges of toxic or nonconventional pollutants. CWA section 304(m)(1)(B)-(C); *Our Children's Earth Found. v. U.S. EPA*, No. 05-16214, 2007 U.S. App. LEXIS 25299, *35-36 (9th Cir. Oct. 29, 2007). Moreover, individual wastewater discharge permits may impose case-by-case, best professional judgment

effluent limitations implementing section 301 when they are issued or renewed. *See* CWA section 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(a)(2), (c)(2).

Past experience has shown that determinations of available technology under section 301 can involve selection among technologies with vastly different, and huge, costs, but little difference in results. For example, in developing Best Available Technology effluent limitations guidelines for bleached pulp and paper mills, EPA considered but ultimately rejected on economic impact grounds a technology option that cost twice as much – about a billion dollars more – while providing only a slight improvement in toxic pollutant discharges and no difference in monetized water quality benefits. *See National Wildlife Federation v. Environmental Protection Agency*, 286 F.3d 554, 559 (D.C. Cir. 2002); 63 Fed. Reg. 18,503, 18,551, 18,544-45 (April 15, 1998). In considering Best Available Technology effluent limitations for offshore oil drilling platforms, EPA relied on several considerations to reject (with the Sixth Circuit's approval) a wastewater reduction technology that, while probably technically available and economically achievable, would have imposed several billions of dollars of additional costs. *See BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796-97 (6th Cir. 1995). (*See also* Phase II rulemaking, where EPA selected a technology with performance in controlling impingement and entrainment at cooling water intake structures approaching that of closed-cycle cooling, but at one-ninth the cost. UWAG Pet. at 8.)

Rather than according deference to EPA's long-standing and permissible interpretation of CWA section 301, the Second Circuit based its decision on its view of how the statutory language is "more properly understood." 475 F.3d at 100. This violated the well-established *Chevron* principle of judicial review, that a reviewing court must not substitute its view of the best reading of a statutory provision for an agency's interpretation that is also a permissible one. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). The Second Circuit's analysis was based largely on its conclusion about what this Court's opinion in *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980), a decision concerning the availability of a variance from Best Practicable Technology ("BPT") requirements for an individual source based on that source's inability to pay, "strongly suggests," 475 F.3d at 98, UWAG App. 27a. The Second Circuit's cursory analysis failed to consider, *inter alia*, statutory provisions related to the post-BPT requirements that evidence clear congressional intent that EPA *not* require technology that results in the least pollutant discharge regardless of cost, i.e. imposing requirements that result in treatment for treatment's sake. *See, e.g.,* CWA section 301(g), 33 U.S.C. § 1311(g), adopted by the Clean Water Act Amendments of 1977, P.L. 95-217; *American Paper Inst. v. Costle*, 660 F.2d 954, 957-58 (4th Cir. 1981).

The stated goals of the CWA are not limited to reducing pollutant discharges; in fact, the primary goal is the restoration and maintenance of the chemical,

physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The Second Circuit's view that a technology option is "best," even if it results in only a slight improvement in environmental performance at far higher costs, not only is *not* the only "permissible" reading of the statutory language, it is not even a facially reasonable one. *See BP Exploration*, 66 F.3d at 796 (" . . . the CWA's requirement that EPA choose the "best" technology does not mean that the chosen technology must be the best pollutant removal. Obviously, BAT . . . must be acceptable on the basis of numerous factors, only one of which is pollution control.")

The Second Circuit's erroneous interpretation of CWA section 301 has the potential to affect many more facilities than just the electric generating plants covered by the Phase II Rule, and even many more than those facilities that have cooling water intake structures. The potential large adverse financial impact on businesses and, ultimately, the American public if the Second Circuit's restrictive reading of section 301 is applied in developing effluent limitations for wastewater discharges makes it all the more important that the Court grant the petitions and correct that erroneous interpretation.

CONCLUSION

For the reasons set forth above, *amici curiae* Cooling Water Intake Structure Coalition and Chamber of Commerce of the United States of America urge the Court to grant the petitions for a writ of *certiorari*.

Respectfully submitted,

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